SUPREME COURT, U. S.

AUG 13 1969

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 467

ROBERT R. KAUFMAN,

Petitioner,

v.

THE ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

MORTON LIFTIN
1819 H Street, N.W.
Washington, D.C. 20006
Attorney for Petitioner

Washington, D. C. · THIEL PRESS · 202-393-0625

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Petitioner prays that a writ of certiorari issue to review the order of the Appellate Division, First Department, of the Supreme Court of the State of New York entered on March 25, 1969 in the above-entitled case.

OPINION BELOW

The court below wrote no opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). On March 25, 1969, the Appellate Division entered an order denying petitioner's motion for an order recalling

the court's disbarment order of February 3, 1966, and for other relief. On May 15, 1969, the Court of Appeals of the State of New York entered orders denying petitioner's motion for leave to appeal and dismissing the appeal taken as of right.

QUESTION PRESENTED

Whether an order disbarring an attorney from the practice of law violates the procedural due process requirements of the Fourteenth Amendment because it is based in part on a finding concerning a matter with respect to which notice was not given in the disciplinary charges.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT XIV,

Section 1. * * * nor shall any state deprive any person of life, liberty, or property without due process of law; * * *

STATEMENT OF CASE

Petitioner was admitted to practice as an attorney and counsellor at law in the State of New York on February 2, 1938. Disciplinary proceedings were instituted on June 12, 1962 by the filing of a petition containing charges of professional misconduct. A supplemental petition containing additional charges was filed on November 17, 1964. A hearing on the charges was held before a referee who rendered his report dated September 24, 1965, sustaining six of the nine charges filed against petitioner. On February 3, 1966, the appellate division confirmed the report of the referee and ordered the petitioner disbarred from practice as an attorney and counselor at law in the State of New York effective February 3 1966. After subsequent proceedings in the court of appeals and the appellate division in which petitioner unsuccessfully sought reconsideration of the disbarment order, petitioner moved on March 10, 1967, for reopening of the disciplinary proceedings and supression of certain evidence on the ground that he had been coerced

into providing the committee on grievances of the Bar Association with incriminating evidence in violation of the Fifth Amendment privilege against self-incrimination. On May 4, 1967, the appellate division denied petitioner's motion and on July 7, 1967, the Court of Appeals denied petitioner's motion for leave to appeal and dismissed the appeal taken as of right. On November 6, 1967, petitioner filed a petition for a writ of certiorari in this Court claiming that the use in this disciplinary proceeding of incriminating testimony obtained by coercion violated his rights under the Fifth Amendment, as incorporated in the Fourteenth Amendment with respect to state action. This petition was denied on January 15, 1968.

On February 3, 1969, petitioner filed a petition in the appellate division for recall and reconsideration of the disbarment order of February 3, 1966, on the ground that his constitutional right to due process of law guaranteed by the Fourteenth Amendment was violated by the finding of the referee that he had made certain fraudulent assignments although the charges in the disciplinary proceedings included no such specification. The finding with respect to fraudulent assignments occurred in connection with Charge No. 8 in the supplemental petition filed by the Bar Association. This charge contained allegations that petitioner converted to his own use his clients' share of the proceeds of the settlement of a claim for personal injuries, subsequently issued a check for the clients' share of the settlement which was returned because of insufficient funds, and falsely represented to the counsel for the committee on grievances that the clients had agreed to lend petitioner their share of the settlement proceeds.

In connection with his finding with respect to this charge that petitioner had converted to his own use a share of the settlement proceeds due his clients, the referee made the further finding that, in an effort to hold off the clients, petitioner made assignments to them of obligations owing to petitioner. The referee devoted several pages of his report to a discussion of these assignments (Referee's report, pages 31-34), characterized the assignments as "worthless" (Id. at

32) and "fraudulent" (Id. at 34), and found, as a result of the assignment, that petitioner engaged in a "course of misconduct" and "acted in a fraudulent manner" (Id. at 34). Charge No. 8 in connection with which the referee made these findings and conclusions contained no allegations with respect to assignments or improper conduct in relation thereto. The opinion of the appellate division on the confirmation of the referee's report upheld his finding with respect to Charge No. 8 without comment on the finding with respect to fraudulent assignments.

Petitioner's motion for recall and reconsideration on the ground that his constitutional rights were violated when he was found guilty of having made fraudulent assignments without any notice of such charges was denied by the appellate division on March 25, 1969. On May 15, 1969, the court of appeals denied his motion for leave to appeal and dismissed the appeal taken as of right.

REASONS FOR GRANTING THE WRIT

A writ of certiorari is sought on the ground that petitioner was denied procedural due process in violation of the Fourteenth Amendment because the disbarment order of February 3, 1966, was predicated, in part, on a finding of misconduct of which petitioner had received no notice. The applicability to disciplinary proceedings of the due process notice requirement was established by this Court's decision in *In Re Ruffalo*, 390 U.S. 544.

In the *Ruffalo* case the court noted "the charge (No. 13) for which petitioner stands disbarred was not in the original charges made against him" 390 U.S. at 549. "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. * * * He is accordingly entitled to procedural due process which includes fair notice of the charge." 390 U.S. 550. The court observed further that "These are adversary proceedings of a quasi-criminal nature. The charge must be known before the proceedings commence." 390 U.S. at 551. The opinion concluded that "This absence

of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." 390 U.S. at 552.

The referee's finding that petitioner made fraudulent assignments to deceive a client is obviously relevant to his suitability to continue as a member of the bar. It must be assumed, therefore, that the finding had a bearing on the determination that disbarment was an appropriate disciplinary measure. The fact that the finding was not identified as a separate charge does not weaken its effect. Nor does the fact that it was considered in connection with another charge render notice of that charge fair notice with respect to the fraudulent assignments finding. The charge that petitioner had appropriated his clients' share of settlement proceeds, which petitioner claimed had been loaned to him, was wholly independent of petitioner's subsequent assignment to the clients of obligations due him by third parties. The referee's findings with respect to the former were made independently of his findings with respect to the assignments. Similarly, the appellate division in confirming the referee's report made a finding with respect to the charge involved independently of any reference to the subsequent assignments. The finding with respect to subsequent assignments, therefore, can only be regarded as a prejudicial finding concerning a separate matter with respect to which petitioner had no notice. As the court noted in *In Re Gault*, 387 U.S. 133,

> "Notice, to comply with due process requirements, must be given sufficiently in advance of court proceedings so that reasonable opportunity to prepare will be afforded, and it must set forth the alleged misconduct with particularity."

The Court's decision in *Ruffalo* establishes that this notice requirement is applicable to disciplinary proceedings. Since the referee found that petitioner had made fraudulent assignments, although he had been given no notice of any such charge, the court below should have granted petitioner's

motion for reconsideration.[1] Its failure to apply the decision of this Court in *Ruffalo* warrants review by this Court.[2]

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MORTON LIFTIN
1819 H Street, N.W.
Washington, D.C. 20006

Attorney for Petitioner

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[1] The *Ruffalo* case was decided by this Court on April 8, 1968, after petitioner's prior petition for a writ of certiorari had been denied on January 15, 1968. *Kaufman v. Assn. of Bar of New York*, 389 U.S. 1048. The Court's holding in the *Ruffalo* case that the absence of fair notice of the precise nature of disciplinary charges constitutes a deprivation of procedural due process is a supervening event which renders timely petitioner's raising of this constitutional issue by his motion of February 3, 1969. *State Farm Ins. Co. v. Duel*, 324 U.S. 154, 160-161; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-678.

[2] In the event certiorari is granted petitioner requests leave to argue also that the disbarment order of February 3, 1966, should be reversed because based upon inculpatory evidence obtained from petitioner by coercion in violation of the self-incrimination prohibition of the Fifth Amendment.

APPENDIX

[Orders of Court of Appeals, May 15, 1969]

A motion having heretofore been made herein upon the part of the respondent to dismiss the appeal taken as of right by the appellant in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the grounds that the order appealed from does not finally determine the action within the meaning of the Constitution and that there is no substantial constitutional question directly involved.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

[Order of Appellate Division, March 25, 1969]

The above-named Robert R. Kaufman having moved this Court for an order recalling the disbarment order of this Court entered on February 3, 1966, and orders and judgments in regard thereto made thereafter, reopening the disciplinary proceedings, suppressing of all evidence obtained from Kaufman, and granting reconsideration, rehearing, renewal, reargument of the charges filed, and for other relief,

Now, upon reading and filing the order to show cause with proof of due service thereof, and the affidavits of Robert R. Kaufman in support of said motion, and the affidavit of Michael Franck in opposition thereto, and after

hearing Mr. Robert R. Kaufman, appearing pro se, for the motion, and Mr. Michael Franck opposed,

It is unanimously ordered that said motion be and the same hereby is denied in all respects.